IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 9.8.2006

CORAM:

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

A.S.No.672 of 1993

Valliyathal .. Appellant

-Vs-

1.Dr.Noel Doss

2.Basheer Mohammed

3.Nahi Munnisa .. Respondents

Appeal against the judgment and decree dated 30.4.1993 made in O.S.No.252 of 1989 on the file of Sub Judge, Tiruppur.

For appellant : Mr.V.K.Muthusami,
Senior Counsel for
Mr.V.Bharathidasan

For respondents : Mr.S.Raghavan
for R2 and R3.

JUDGMENT

This appeal is preferred against the judgment and decree, dated 30.4.1993, made in O.S.No.252 of 1989 on the file of Sub Judge, Tiruppur. The plaintiff is the appellant.

2. The case of the plaintiff is that the first defendant executed an agreement of sale with her on 12.9.1985 agreeing to sell the suit properties for a sum of Rs.60,000/- and received an advance of Rs.10,000/- from the plaintiff on the same day and it was also agreed that the plaintiff has to pay the balance sale consideration of Rs.50,000/- on or before 11.12.1985 and get the sale deed executed. It is further stated in the plaint that after executing the agreement, the first defendant was evading the execution of sale deed inspite of repeated requests by the plaintiff and the plaintiff is always and ready and willing to perform her part of the agreement by offering the balance sale consideration, but still, the first defendant was postponing the execution under some pretext or other and later on the plaintiff came to know that the first defendant

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executed the sale deed in favour of the third defendant conveying the properties including the suit properties and the alleged transaction will not affect the agreement of sale between the plaintiff and the first defendant and the first defendant is bound to execute the sale deed to the plaintiff as per the agreement and the third defendant has purchased the suit properties after knowing about the existence of the agreement and the sale deed is not binding on the plaintiff and the first defendant and third defendant are bound to execute the sale deed in favour of the plaintiff and to deliver possession of the suit properties.

It is further stated by the plaintiff that though three months time has been fixed in the agreement, the time was not the essence of the contract and the first defendant alone is responsible for the delay in completing the transaction and the plaintiff has sought for a direction to the defendants 1 and 3 to execute the sale deed of the suit properties in favour of the plaintiff after receiving the balance sale consideration and to deliver possession and in the event of their failure, the sale deed to be executed by the Court.

3. The first defendant in his written statement as well as in the additional written statement has admitted that the plaintiff has entered into a contract with him on 12.9.1985 to purchase the suit properties for a sale consideration of Rs.60,000/- and paid a sum of Rs.10,000/- as advance and the balance sale consideration of Rs.50,000/- has to be paid on or before 12.12.1985 and as per the terms of the agreement, the time is the essence of the contract and the first defendant on several occasions, expressed his intention to dispose of all his immovable properties at Tiruppur since he wanted to shift his family to Coimbatore and that is the reason for fixing the time limit for completion of the sale and the plaintiff was never ready at any time to execute the sale agreement and did not take any step to extend the time stipulated in the agreement and the first defendant in person and through letters, requested the plaintiff and her husband to pay the balance sale consideration and get the sale deed executed and inspite of it, they were not ready and willing. It is further stated by the first defendant that the plaintiff knew about the sale of the suit properties to the third defendant and the plaintiff alone committed breach of contract and she is not entitled to the relief of specific performance.

4. The second defendant in his written statement has stated that he has nothing to do with the suit properties and he is an unnecessary party to the suit.

5. The third defendant in her written statement has stated that she purchased the suit properties for a valid sale consideration of Rs.2,40,000/- from the first defendant under a registered sale deed dated 26.5.1986 and she is a bonafide purchaser for value and even if

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the sale agreement is true, the plaintiff cannot specifically enforce the same since the time had expired and the suit is liable to be dismissed.

6. The plaintiff in her reply statement has stated that the first defendant himself has admitted that he waited for the contract to be completed even after 11.12.1985 and hence the time is not the essence of contract to both the parties and the agreement dated 12.9.1985 was never terminated by the first defendant and the plaintiff was always ready and willing to perform her part of the contract.

7. The Trial Court framed seven issues and the plaintiff examined herself as P.W.1 and examined P.W.2 on her side and marked Exs.A1 to A4 and the first defendant examined himself as D.W.1 and the third defendant examined herself as D.W.2 and marked Exs.B1 to B24. On a consideration of oral and documentary evidence, the Trial Court held that the time was the essence of the contract as per the sale agreement and the plaintiff was not ready and willing to complete the transaction as per the agreement and the third defendant is the bonafide purchaser for value and the plaintiff is not entitled for the discretionary relief of specific performance. Aggrieved over the judgment and decree, the plaintiff has preferred the present appeal. In this Judgment, for the sake of convenience, the parties are referred to as arrayed in the suit.

8. The points for determination in this appeal are:-

"1.Whether time is the essence of the contract.

2.Whether the plaintiff was ready and willing to perform the contract."

POINT Nos.1 and 2:-

9. Mr.V.K.Muthusami, the learned Senior Counsel for the appellant would urge that time is not the essence of the contract insofar as the sale of immovable property is concerned. Per contra, Mr.S.Raghavan, the learned counsel for the respondents 2 and 3 submits that having regard to the terms of the contract, it is clear that there was an obligation to pay the balance of sale consideration of Rs.50,000/- within three months from the date of the agreement, more specifically commencing from 12.9.1985 on or before 11.12.1985 and failure to do so, would render the contract vitiated and the parties did intend to make time the essence of the contract.

10. It is well settled principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. It has to be ascertained whether under the terms of the

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contract, the parties stipulated any specific time within which, it has to be completed and in substance, it was intended that it should be completed within a reasonable time. In other words, an intention to make time, the essence of the contract must be expressed in an unequivocal language. Mere incorporation of a clause in the agreement imposing penalty in case of default does not by itself evidence an intention to make the time of the essence. The Court should look at all the relevant circumstances including the time limit specified in the agreement and determine whether its discretion to grant specific performance should be exercised.

11. The Constitution Bench of the Apex Court in the case in CHAND RANI v. KAMAL RANI ((1993) 1 SCC 519) has laid down the true principle that even where time is not the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all surrounding circumstances including the express terms of the contract and the nature of the property.

12. In the above legal background, we have to look at the terms of the suit agreement. Ex.A1 is the Sale Agreement dated 12.9.1985 and the first defendant has admitted that he executed it agreeing to sell the properties belonging to him for Rs.60,000/- and received an advance of Rs.10,000/- on the same day and the plaintiff has to pay the balance of sale consideration of Rs.50,000/- within a period of three months viz., on or before 11.12.1985. For better appreciation, the relevant portion of the Agreement is extracted below:

> "நம்மில் 1 லக்கமிட்டவருக்கு கிரைய வகையில் பாத்தியப்பட்டு 1 லக்கமிட்டவர் சர்வ சுதந்திரமாய் நிராட்சேபனையாக ஆண்டு அனுபவித்து வருகிறதுமான இதனடியிற்கண்ட சொத்தை 2 லக்கமிட்டவருக்கு ரூ.60000./ ஆறுபதாயிரத்துக்கு கிரையத்துக்கு கொடுப்பதாக பேசி நாமள் ஒப்பக் கொண்டு நாளது தேதியில் 2 லக்கமிட்டவரால் 1 லக்ககமிட்டவர் அட்வான்ஸ் ஆக பெற்றுக் கொண்டது ரூ.10000/-் ும் பலகு ரூபாய் பத்தாயிரம் போக பாக்கிக் கிரையத்துகை ரூ.50000/- மும் இன்றிலிருந்து 3 மாதக் கெடுவிற்குள் அதாவது 12.9.85 தேதியிலிருந்து 11.12.ஙூ85 தேதிக்குள் நாளது தேதியில் இப்போது 1 லக்ககமிட்டவர் பெற்றிருக்கும் அட்வான்ஸ துகை ரூ.10000/- போக பாக்கி கிரையத்துகை ரூ.50000/- ஐம்பதாயிரத்தை 2 லக்கமிட்டவர் 1 லக்கமிட்டவருக்கு செலுத்தி 2 லக்கமிட்டவர் செலவில் கிரையப் பத்திரம் எழுதிப் பத்திரத்தைப் பதிவு செய்து கொடுக்கும்படி கேட்டால் 1 லக்கமிட்டவர் டை துகை ரூ.50000/-ஐப் பெற்றுக்கொண்டு 2 லக்கமிட்டவர்க்காவது 2 லக்கமிட்டவர் கோறும் நபருக்காவது சர்வ வில்லங்க சுத்தியாய் கிரையம் செய்து கொடுக்க உள்ளவா ; ."

13. The case of the plaintiff as spoken by her as P.W.1 is that she was always ready and willing to perform her part of the contract and on a number of occasions, she approached the first defendant offering the balance of sale consideration to complete the sale transaction as stipulated in the agreement, but the first defendant was postponing the same under some pretext or other and later she

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came to know that the first defendant has executed the sale deed in favour of the third defendant conveying the properties.

14. The specific case of the first defendant is that prior to agreement, he has expressed to the plaintiff his intention to dispose of all his immovable properties at Tiruppur and to shift his family to Coimbatore and that is why the time for execution of the sale deed was specifically mentioned in the agreement and the plaintiff was never ready and did not take any step to complete the transaction within the stipulated time and the first defendant by letters demanded the execution of the agreement. The first defendant as D.W.1 has adduced oral and documentary evidence in this regard.

15. Ex.B3 is the letter dated 7.12.1985 sent by the first defendant to the plaintiff requesting her to complete the sale transaction as per the agreement. Ex.B2 is its certificate of posting evidencing the despatch of the letter. After the expiry of time stipulated in the agreement, i.e., after 11.12.1985, the first defendant sent Ex.B4 letter dated 20.12.1985 stating that the plaintiff has not performed her part of the contract and allowed the time to expire and hence the advance amount stood forfeited. Ex.B5 is the certificate of posting evidencing the despatch of it to the plaintiff.

16. Except paying the advance amount of Rs.10,000/-, the plaintiff did nothing to comply with the terms of the agreement, which require to pay the balance and ask for execution of the sale deed within the time stipulated. If really the case of the plaintiff that she approached the first defendant offering the balance of sale consideration and demanded the execution is true, the same must have been reflected by a notice from her to the first defendant and that was not done and no such notice was issued within the stipulated time. Further, there was no reply to Exs.B3 and B4 letters sent by the first defendant. The first defendant has sold the suit properties to the third defendant by Ex.B18 Sale deed dated 28.5.1986 and thereafter, the plaintiff has chosen to send Ex.A2 notice dated 24.9.1986 to the first defendant and the suit was filed only on 1.9.1989.

17. The analysis of evidence shows that the first defendant was heavily indebted and with the object of discharging the loans and shifting his family to Coimbatore, he has stipulated the time in the sale agreement and the intention to make time as the essence of the contract is evidenced from the surrounding circumstances. It is the case of total inaction on the part of the plaintiff and the Trial Court has rightly held that the plaintiff was never ready and willing to perform her part of the contract and she is not entitled to the relief of specific performance. The points are answered accordingly.

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18. There are no merits in the appeal and the same is dismissed. No costs.

vks

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

1.The Subordinate Judge,
Tiruppur.

2.The Section Officer,
V.R.Section,
High Court, Madras.

+ one cc to Mr.S.Raghavan, Advocate Sr.No.35433.

KG (CO)
RSM/18.10.2006

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